Supreme Court, U.S.
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In The
Supreme Court of the United States

Gerald Simonsen, Ilse Simonsen, Pamela Simonsen, Paulette Simonsen and Christine Simonsen
Petitioners

V

Chicago Board of Education, Paul Vallas, Marilyn Johnson, Carol Gearring, Jose Rodriguez, Et. Al.
Respondents

On Petition For Writ Of Certiorari
To The Court of Appeals, Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners pro se
By Gerald Simonsen
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No phone

QUESTIONS PRESENTED

1. Whether the District Court properly granted Respondents' Motion for judgment on the pleadings, FRCP 12(c) which argued the Petitioners' federal claims were barred by *res judicata*, without Respondents having any *res judicata* pleadings in record.
2. Whether the district court ruling "The Seventh Circuit, however, 'deprecates the practice of filing two suits over one injury,' noting that '[m]ultiplication imposes needless costs on one's adversary, on the judicial system, and on other litigants, who must endure a longer queue.' *See Rogers v. Desiderio,* 58 F.3d 299, 300 (7th Cir. 1995). To discourage claim-splitting a plaintiff is entitled to which judgment is rendered first, and the second court simply dismisses the case pursuant to doctrine of claim preclusion," violates 28 U.S.C. / 1738 (See A-4)
3. Whether petitioner Gerald Simonsen's two year suspension without pay was unlawful as Respondent board of education violated its own suspension policy, state law and federal well-established due process rights found in the United States Constitution, 14th amendment, and Supreme Court of the United States decisions.
4. Whether violations of 23 Illinois Administrative Code rules, due process rights under the 14th Amendment to the United States Constitution and well-established Illinois Supreme Court decisions requires petitioner Gerald Simonsen's reinstatement to his constitutionally protected property.
5. Whether the Illinois Appellate Court unlawful order violated Petitioners Gerald Simonsen's due process rights under the United States Constitution, 14th Amendment and well-established Illinois Supreme Court decisions.

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List Of Respondents Not Listed On Cover

Cheryl Nevins, Sharon Bailey, Gwen Smith, Carlos Ponce, Karina Bermejo James Ciesil.

Rule 29.6 STATEMENT

Petitioners have no parent, nor publicly held companies that hold any stock of the petitioners.

TABLE OF AUTHORITIES

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OPINIONS BELOW

1. Order of Court of Appeals (7th Cir.) denying en banc rehearing on November 17, 2004 unpublished order of Court of Appeals (7th Cir.) affirming district court on October 22, 2004
3. District Court order (1/5/04) denying Petitioners' Motion to Alter or Amend order of Dec23-03
4. District Court Order dismissing case on December 23, 2003

JURISDICTION

The Court of Appeals judgment was entered on October 22, 2004. A timely petition for en banc rehearing was denied on November 17, 2004. The jurisdiction of this court is invoked under 28 U.S.C Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Federal Rules of Civil Procedure 12(c); Rule 10(c) 28 U.S.C Sec. 1738; U.S. Constitution Art.1 paragraph 9, 10 and 14 Amendments to U.S. Constitution; Illinois statutes, 105 ILCS 5/34-85, 5/24A, 5/2-3.25q; 735 ILCS 5/3-112 inclusive; 23 Illinois Administrative Code;Title VII of the Civil Rights Act of 1964.

STATEMENT OF CASE

A. Introduction Illinois Political Power Over Law

This case involves Respondent Chicago Board of Education (Board) discharging Petitioner Gerald Simonsen (Gerald) from his Tenure teaching employment after 22 years without cause. The actions of Respondents violated Gerald's property rights found in the United States Constitution, 14th Amendment and Illinois Tenure Law. Gerald's due process rights as a Tenure teacher were repeatedly abused by the Board, individual Respondents, the Illinois State Board of Education (ISBE), local and state courts.

Gerald being discharged without cause violates: *Townsend v. Vallas*, 99F, Supp. 2d 902, 903 as Gerald's due process rights to a full and fair dismissal hearing 14th Amendment and other decisions of the highest court in U.S. and highest court in Illinois were ignored.*Board of Education Rockford V IELRB* 649 N.E. 2d, 367, 373.

Aulwurm v. Bd. Of Education of Murphy boro, 367 N.E. 2d 1337, 1338.

Petitioners file this Writ of Certiorari because Illinois administrative review courts affirming the Board's dismissal of Gerald have been overawed by the Respondents' political power. This case represents that clout trumps the law in Illinois. Federal law was ignored in this case. Illinois law was ignored in this case. In Illinois it is common for courts to look the other way when political powers are in court. Chicago Mayor Daley controls the Board, and all Respondents are employees (or were) employees of the Board. Daley's clout protects the Respondents more than the United States Constitution or Illinois law protects Petitioners rights.

In support that Illinois courts are well known to rule based on clout rather than law, the United

States Court of Appeals (7th Cir.) Honorable Judge Posner found in *Esmail V Macrance* 53F3d 176, 180.

> "Although the courts of Illinois seem to have been perfectly ready, willing and able to protect Esmail against Mayor Macrance, powerful state or local officials are not infrequently able to overawe state or local courts."

This case provides that Judge Posner findings of Illinois courts can now be applied to the federal courts in the Seventh Circuit.

Petitioners pray that the Supreme Court of the United States grant this Petition of Writ of Certiorari to review the shameful disregard of law and facts found in this case by Illinois and Federal courts.

B. Facts and Historical Background

1. Mayor Daley given control of Chicago public schools

The Illinois Legislature in 1995 gave the Chicago Mayor control of the public schools. The previous five years the Board had discharged an average of eight Tenure teachers per year. In five years of Daley's control more than 400 teachers were discharged. Apparently, Daley had decided that the removal of teachers would show the public that Daley was working to improve schools. Daley's Board adopted in 1995 a Discipline Code, which provided to principals the power to discipline teachers pursuant to Board policy.

Petitioner Gerald was singled out for discipline by Respondent Gearring, Principal, for wearing gym shoes at work. Other teachers wore gym shoes but were not disciplined. Gearring wanted Gerald out of the school after having removed the other

male teachers. Daley's Board ignored the unequal treatment of Gerald. Gerald's suspension of five days without pay was the first discipline Gerald received in 20 years working for the Board.

2. Discrimination/Harassment/Retaliation

Gerald filed an EEOC complaint. The Board answered with lies. Gerald won a Union grievance as Gearring was not honoring the Teachers Contract. Not long after winning the grievance, Gerald was suspended under false charges written by Gearring, judged by Gearring and Gearring ruled for Gearring. Gerald suspended five days without pay. One of the three false charges was Gerald wearing gym shoes. Female teachers wearing gym shoes were not disciplined/suspended. Board on appeal affirmed Gearring's discipline suspension without pay.

In 1997, Gerald was voted on the Local School Counsel (L.S.C.) by the staff at the school as Teacher Representative on the L.S.C. The L.S.C. had the power to hire, rehire and/or fire the principal. Gerald became chairperson of the Principal's Evaluation Committee. Gearring's evaluation by the L.S.C. was not what Gearring felt she deserved. Gearring contract was coming up for renewal and with Gerald off the L.S.C. her chances of renewal were much better. Gearring's first year as principal harassed seven of eight male teachers to transfer. As Gerald was the lone male teacher left, Gearring started a campaign to remove Gerald from the school. At first she offered to help teachers not pleased with her leadership to transfer. Gerald did not transfer. So Gearring made up other false suspension charges. Gerald was suspended for 10 days and then 15 days without pay. All of Gerald's appeals were denied by the Board. (See complaint paragraph #25)

Gearring went to the Board to give Gerald a warning resolution on April 21, 1999. Then again on June 23, 1999. These Board warnings were false. The Board merely rubber-stamped Gearring's lies. After each warning, Gerald went to the Board Trustees monthly meeting and personally told the Trustees of the Board their warnings were false. In the Board's warnings Gerald was told not to wear gym shoes. This conflicted with other Board teachers who could wear gym shoes. Thousands of teachers wore gym shoes without discipline. Gerald received suspensions of 5, 10 and 15 days without pay.Gerald's ratings were satisfactory or excellent for his 22 years of teaching. Gerald never received an unsatisfactory evaluation.

3. Ex Post-Facto-False Charges

For taking one sick day (November 3, 1999), Gerald was removed from teaching by Gearring's boss, Respondent Rodriguez. The sick day was approved by Gearring pursuant to Board/Union contract. Rodriguez ordered that Gerald sit in the school library on November 4th, 5th and 6th, 1999, as the school had no jail cells. On November 9th, Gerald was ordered to sit at Rodriguez's offices, in the conference room until dismissal charges could be written. Gerald was not given any teaching duties.

After the 1998 –99 school year Gearring rated Gerald as a satisfactory teacher pursuant to the Illinois school code.

On November 17th 1999, Gerald received dismissal charges and specifications in the Bill of Particulars. Most of the charges were minor and Gerald denied all of them including the two ex post-facto charges. The two

a. The Board claimed Gerald violated the April 21, 1999 false Board warning. Gearring lied

that Gerald refused to give his grade book for her to examine throughout the 1998-99 school year. At the ISBE hearing she testified in October 1998, November 1998 and December 1998 Gerald refused to submit this grade book. This was perjury. The hearing officer, Marvin Hill, Jr. (Hill) believed Gearring's lies ruling for the Board. The problem being Gerald could not have violated an April 21, 1999 warning in October, November and December 1998. Gerald never refused to submit his grade book to Gearring at any time. At the close of 1998-99 school year, Gerald was given a satisfactory evaluation.

b. The Board claimed Gerald violated a June 24, 1999 warning on June 16, 1999. Gerald could not have violated the June 24 warning eight days prior to the warning. Ex-post facto charges are not allowed by the U.S. Constitution Art 1, paragraphs 9 and 10. These ex-post facto charges were affirmed by Hill and used for Gerald's dismissal. Hill ignored the United States Constitution prohibiting ex post-facto charges.

The Board's only serious charges, which could provide for dismissal. (Group 4 charges) were dropped by the Board. The other charges against Gerald provided under Board policy at most a 10 days suspension without pay. The Board elevated minor charges to dismissal charges because they were out to get Gerald, without lawful cause. This violates the finding of *Bd. Of Educ. Sparta Comm. Unit School Dist. 140 v. ISBE,* 594 N.E. 2d 984, 988 that "significant harm" is the standard to remove a tenure teacher.

4. Pre-suspension hearing violates *Cleveland Bd. V Loudermill* 470 U.S. 532, 540 and state law

The District Court wrote in an interlocutory order on February 13, 2002 (pg. 7, 8)

"Simonsen claims that the November 1999 pre-dismissal suspension hearing deprived him of property without due process of law. Although he received a hearing before Bailey, an employee of the Bureau of Labor and Employee Relations of the CPS, he claims that the dismissal charges were not explained to him, that no evidence for the charges was presented, that he was not allowed to present a defense, that Bailey was biased against him, that the hearing was a sham and that the Board knew about these violations but chose to do nothing. See Compl. Paragraphs 46-50, 54. Even if all of these allegations are true, however, we cannot allow these claims to proceed. Simonsen's pre-dismissal suspension hearing, no matter how flawed, was followed by a full evidentiary dismissal hearing[15]." .

The District Court ruling Gerald's claim of due process violations could not proceed ignored the fact that statute 105 ILCS 5/34-85 was violated. When the Board violated Section 5/34-85 it was without authority to suspend Gerald, with/or without pay. Based on "An administrative agency exercises purely statutory power and any power exercised by the agency must come from the provisions of the statute the agency enforces" (See *Wilson V Illinois Department of Professional Regulation*; 739 N.E 2d 57, 61 "To the extent that an agency acts outside its statutory authority, it acts without jurisdiction" (See *Piecuch V Cook County Sheriff's Merit Board*, 726 N.E 2d 22, 24-25)

"Agency is itself bound by the rules it promulgates, and must adhere to them" *Albazzaz V Illinois Department of Professional Regulations*, 731 N.E. 2d 787, 794

"Since administrative agency is creative of legislative body from which it derives its existence and authority, any of its acts or orders which are unauthorized by statute are void" *City of Chicago V Illinois Commerce Commission*, 689 N.E. 2d 241, 246

The Board not only violated *Loudesmill*, id. by not explaining the charges, refusing to take evidence into the record, and not allowing Gerald to provide a discrimination defense at the Board pre-suspension hearing. See *Pirela* v Village of North Aurora,935 F 2d 909,913-914 finding discrimination defense are allowed at administrative hearings. The Board also violated state law Section 5/34-85. The Board's two-year suspension of Gerald under law should be voided. See *City of Chicago*, at 246

Gerald at minimum deserves two years of salary based on unlawful suspension, regardless of any dismissal decision. U.S. Court of Appeals found all interlocutory orders of the District Court to be barred by res judicata including the constitutional violations found in Gerald's two year unlawful suspension without pay. This was an error because it conflicts with the *Pirela, id* ruling.

5. Holding Administrative hearing outside of 23 Ill. Admin. Code violated due process of Petitioner Gerald Simonsen.

The procedures to dismiss an Illinois Tenure teacher are mandatory. So ruled the Illinois Supreme Court in *Board of Education Rockford V IELRB*, 649 N.E 2d 367, 373.The procedures of 105 ILCS 5/34-85 required the Board to send to the teacher within 5 days of approval of charge, a copy of the charges. This was the only part of the process complied with by the Board. The statute requires the Board to send within 5 days notice of charges to the ISBE and request a list of impartial hearing officers from the ISBE. The ISBE has 10 days to send a list of 5 potential hearing officers.

In this case the Board, rather than the mandatory 5 days to notify the ISBE, took 47 days without cause. The ISBE, rather than the mandatory 10 days to send a list of hearing officers to the parties took 60 days, far beyond the Illinois statute.

The statutory 15 days to start to process took the Board and ISBE 107 days, violating section 5/34-85.

Petitioner Gerald filed for reinstatement due to Board and ISBE failure to comply with the statute. The Board and ISBE are administrative agencies with no common law powers in Illinois.

"Any of its acts or orders which are unauthorized by statute are void" City of Chicago v Illinois Commerce Commission, 689 N.E 2d, 241, 246.

The ISBE hearing officer heard the evidence and saw exhibits showing the Board adopted charges on November 12, 1999, and sent notice 47 days later on December 27, 1999; only to delay the process to being greater hardship on Petitioner Gerald who was suspended without pay on December 6, 1999. The longer a tenure teacher stays without pay during the process the more likely the tenure teacher will resign; as a quarter of Chicago teachers did resign rather than tolerate the Boards/ISBE abuse of the statute.

Hearing Officer Hill ruled that Gerald and the Union had violated the statute by not requesting a dismissal within 10 days of approval of charges. Hill concluded that a reviewing court would hold that a hearing officer is without jurisdiction to proceed with the termination hearing because of the procedural defects on the part of Gerald Simonsen and his Union. Specifically, Simonsen's failure to request a hearing within 10 days after receiving notice of the charges. (See ISBE Hill's report in the federal record.)

Upon Hill's ruling that Gerald, not the Board, had violated the mandatory procedures of the statute Gerald asked, "So what are we doing here?"

Hill replied: "Then we all go home. Then its all over. But those folks [the Board of Education] have said in your case they waived it. So you would get your day in court. They waived that ten day period." [See ISBE transcript (R. 408-09)]

When Chicago teachers failed to request a hearing within 10 days, the Board merely fires them pursuant to violation of the statute. The Board previously had never waived statutory procedures in order to "give" a tenure teacher a hearing.

Hill's ruling was against the manifest weight of the evidence. This explains why the Board "waived that ten-day period." The Board was fully aware that it had violated the statute.

Legally however the Board had no authority to waive procedures in 105 IBCD 5/34-85, more so the Board had no authority to waive provisions of tenure pursuant to 105 ILCS 5/2-3.25. Section 5/2-3.25q states in part

"Waivers may not be requested for matters of special education from laws, rules, or regulations pertaining to teacher certification, tenure, or seniority." (See Petitioner's Exhibit No. 4 in Appendix)

The Board violated the Section 5/34-85. Then the Board awed Hill to rule Gerald violated 5/34-85. Then the Board "waived" statutory provisions unlawfully while at the same time violating Section 5/2-3.25q. The Board was caught in its own lies. The Board has no common law authority to waive Illinois statutes.

Other provisions of 23 Illinois Administrative Code violated by Hill and/or the Board were:

1. Quashing defense subpoenas...15 defense subpoenas were quashed in total.

2. Granting the Board two protective orders…Board employees protected from subpoenas.

3. Failure to exclude witness from hearing per rules…allowed Board witness to hear testimony of other Board witnesses.

4. Excluding defense exhibits relevant to charges…no Board exhibits excluded.

5. Failure to comply with discovery provisions by Board allowed.

Then Hill violated Illinois Administrative Code ending the hearing. on a motion by the Board. This denied Simonsen's defense to be part of the record. *23 Illinois Administrative Code, Section 52.70 (e) states*: "Before concluding the hearing, the hearing officer shall inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative, the hearing officer shall declare the hearing concluded…"

At the ISBE hearing, Gerald subpoenaed four Board employees in his defense. These employees refused to appear at the hearing. The hearing officer advised Gerald to re- subpoena the four Board employees. Gerald was informed that if the Board employees refused to appear the second time, Gerald could go to the circuit court for subpoena enforcement by a Judge. Gerald re-subpoenaed the four witnesses for July 23rd hearing (2001) and in addition to those four, Gerald also subpoenaed four other Board employees to appear July 23, 2001.

On July 23, 2001 these eight Board employees failed to appear under subpoenas. Gerald requested time to seek circuit court enforcement of his administrative subpoenas. The Board objected. The hearing officer ruled that Gerald could not have time to seek enforcement of

the subpoenas. Due to Board employees failing to appear under administrative subpoenas, the Board motioned the hearing be concluded. Granted by hearing officer. Hearing ended without Gerald's defense in ISBE record. Eleven of Gerald's defense witnesses had a Protective Order so Gerald could not subpoena. Eight Board employees failed to appear under subpoena. Twelve other subpoenaed witnesses never had an opportunity to appear as hearing ended. Thirty-four other defense witnesses given no opportunity to appear. Sixty-five witnesses for the defense couldn't, wouldn't, or weren't able to give defense testimony based on the unfair nature of the hearing, totally controlled by the Board to unlawfully discharge a tenure teacher.

As the Illinois statue was violated by the Board, and the administrative code was violated; Gerald was denied due process to his property rights found in the United States Constitution, 14th Amendment, and due process rights under Illinois Laws and Illinois Administrative Code. Illinois. Administrative rules are construed under the same rules of construction construing statutes. *White v. Dept. of Employ Sec.*637 N.E. 2d 647, 648-50.

The Board's false charges, including ex post facto charges and minor false charges propped up with lying witnesses, overawed the administrative process in Illinois due to the political clout of the Board's boss.

6. Discrimination defense at Board's pre-suspension hearing and ISBE hearing excluded.

The U.S. Court of Appeals wrote in *Pirela v Village of North Aurora* 935 f2d 909, 913-14 "administrative bodies are permitted to consider defenses of discrimination during their hearing. See e.g. *Welch,* 907 F2d at 723-25; *Lee*, 685 F2d at 200; *Police Pension Fund,* 95 IllDe at 764. *Coler v Redd,* 427 N E 2D 622, 623-24 (1981), *Strobeck v Illinois*

Civil Service Commission, 388 N E 2D 912, 916-17 (1979), *Fox v Civil Services Commission*, 383 N. E 2d 1201, 1204-05 (1978)

a. Board administrative pre-suspension hearing violated Pirela, Id. The board refused to hear of the discrimination defenses at the Nov. 30, 1999 pre-suspension hearing. The hearing: "You know what, Mr. Simonsen, let me stop you right there. What you need to do is give me any information that you have regarding the charges and not your personal opinion about a principal that's not here to defend herself as well." [Transcript page 24, pre-suspension hearing of 11-30-99] [Exhibit in federal record.] Attached as Exhibit No. 3 hereto.

b. ISBE dismissal administrative hearing excludes discrimination defense.

On December 3, 2000, the ISBE hearing officer Hill wrote the parties a ruling which stated in part: Any testimony not related to a specification outlines, or Mr. Simonsen's theory that he was somehow the object of discriminatory treatment by the principal, will be excluded." [See A-ex #1]

On January 28, 2001, Hill wrote the following:

> "I am ordering Mr. Simonsen to focus his direct examination on the specifications outlined in the Board's notice of charges. To this end, I am requesting that any witness called by Mr. Simonsen, or the Board in rebuttal, testify to his or her direct knowledge of the charges outlines in the specifications. Most of the charges are "one-on-one" situations, so unless a witness was there, observing first hand the events between Simonsen and Principal Gearring, no purpose is served in calling such a witness. Any testimony not related to a specification outlined, or Mr. Simonsen's theory that he was somehow the object of

discriminatory treatment by the principal, will be excluded. I trust both parties will be diligent in presenting witnesses consistent with this ruling." [See Ex No. 2 in App.]

c. Board and ISBE violated federal courts.

Finding The United States Court of Appeals (Seventh Circuit) in *Pirela* id found well-established that discrimination defenses may be brought to administrative hearings, yet the Board and the ISBE both denied Gerald full and fair opportunity to defend his tenure property protected under law.

d. No ISBE ruling on the merits

Gerald never had a fair or lawful hearing at the ISBE administrative hearing. After the Board presented its false/ weak case, the hearing was closed on motion of Board . Gerald's full defense was excluded at ISBE administrative hearing.

Remand to ISBE for fair and full hearing is the minimum required in this case, as remand to the district court (new judge) is required to fairly review Petitioner's complaint at law.

7. Hearing officer granted Protective Orders against Gerald's due process rights for defense of protected property.

After Gerald provided the Board with his list of 66 potential witnesses the Board filed a Motion for Protective Order asking the Hearing Officer (Hill) to prohibit Gerald from subpoenaing seven Board employees. The Board asked in a second Protective Order that four more Board employees be protected from subpoena. Hill grants both motions despite not having the authority under the IBSE's 23 Illinois Administrative Code. The Protective Orders prohibit Gerald subpoenaing Vallas, Johnson, Rodriguez,

Nevins, Bailey, Ponce and Ciesil at the ISBE administrative hearing. These seven Board employees are defendants in the federal court. Also, Gerald was barred from subpoenaing Board employees Berman, Chico, Owens and Benway. All had knowledge of the changes in the Bill Of Particulars. Apparently, the Board had the clout to pick defense witnesses in this case.

While Hill granted a Protective Order, so the 11 Board employees could not all be subpoenaed by Gerald, these same employees were named on Board exhibits, or mentioned by the Board witnesses during testimony. These Protective Orders were a hardship to Gerald's defense to bring the truth to the ISBE record. Especially because Board witnesses Gerring, defendant Smith and Dillion misinformed Hill repeatedly through perjured testimony.

The use of perjury violated Gerald's due process rights pursuant to *Giglio v United States*, 405 U.S. 150, 153 and *Napue v Illinois,* 36- U.S. 264, 269 citing *Alcorta v Texas,* 355 U.S. 28. These Supreme Court decisions are relevant to this writ as the *Giglio* id. the court found:"deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice."

In *Napue* id. this Honorable Court found false testimony "must fall under the 14th Amendment to the United States Constitution."The Board allowing the perjury by Board witnesses applies to *Alcorta* id. finding "allowing it to go uncorrected when it appears to give rise to

error." Much of the testimony of the Board's witnesses was in error.
The perjury gave rise to error in that the Illinois Appellate Court used false testimony in affirming the ISBE administrative hearing. None of the Appellate Court's "infractions" were charged against Gerald, nor could be proven.

8. Illinois Appellate Court order affirming dismissal was unlawful .
A. Gerald's dismissal did not follow mandatory procedures to dismiss a tenure teacher as the order found in Illinois Supreme Court decision *Bd. Of Educ. Rockford v. IELRB*, 649 N.E. 2d 367, 373 that the procedural mandatory requirement found in the law must be complied with for the Chicago board, and the ISBE to have jurisdiction. Ill. Appellate Court looked the other way.
B. The Ill. Appellate Court order of 9/25/03 violated Illinois Supreme Court decision of *Aulwurm v. Bd. Of Educ. Murphyboro,* 367 N.E. 2d 1337, 1338 which found that only charges found in the Bill of Particulars may be used for dismissal of a tenure teacher. The Ill. Appellate Court affirmed Gerald's dismissal based on supposed "infractions" found by the Ill. Appellate Court which were not in the Bill of Particulars. Further, Gerald never received notice of the "infractions", nor did the ISBE administrative record provide any proof for the Ill. Appellate "infractions". The Board knew the infractions were false and never entered evidence on the false "infractions". Illinois Appellate Court ignored Illinois

Supreme Court well established decisions to rule for Daley's Board.

C. Board admitted to the Illinois Supreme Court that the Illinois Appellate Court failed to review all of Gerald's claims.

Gerald claimed that the Ill. Appellate Court did not review his many claims of error from the ISBE hearing and was admitted to by the Board [See Board Reponse to Ill. Supreme Court].

Merely looking at the Illinois App. Order proves the Board was misleading the Illinois Supreme Court. Actually, the Illinois Appellate Court failed to review not only three claims (exclusion of discrimination defense, Sixth Amendment violation, and missing witness defense) but eighteen claims. (See Federal record)

II. REASONS FOR GRANTING PETITION

1. Federal Rules of Civil Procedure 12(c) conflicts with dismissal in this case.

The most obvious reason to grant this petition is Rule 12(c) itself states: Waiver: "A motion for judgment on the pleadings cannot assert defenses and objections that a party has waived by failing to timely assert in a preliminary Rule 12b motion or in the responsive pleading."

Nowhere in the record has Respondents pleading *res judicata* defenses. Only in the 12(c) motion does the Respondents plead *res judicata* bars this suit. All Respondent filed motion to dismiss petitions, all filed responsive pleadings. No responsive pleading argued *res judicata.*

This suit was stayed pending state action. The court ruled Petitioner had split his claims. No Respondents objected to the stay. In fact Respondents joined in the stay motion.

"Under Illinois law failure to object to claim splitting acts as a waiver of *res judicata* defenses of Respondent." *Airtite, a Division of Airtex Corp. V DPR Ltd. Partnership*, 265 Ill. App. 3d 214, 219 (1994). Respondent's *res judicata* defense was waived pursuant to Illinois law and FRCP 12(c) rules.

2 Violation of Federal Rules of Procedure should not be affirmed

If Petitioner violates Federal Rules of Civil Procedures (FRCP), a consequence might include dismissal of his federal suit. What happens if a district judge violates FRCP? If federal judges can rule outside the rules and no consequences occur, this would allow the federal judges to become "free agents" and law, and precedent goes out the door. As Petitions for writ of certiorari has increased over the years, one reason might be that the Supreme Court of the United States needs to actively move to assure rules of procedures are respected by

federal courts. Granting this Petition would allow the court to reaffirm what FRCP 12(c) entails and how 28 U.S.C. / 1738 is to be applied. Apparently Seventh Court judges need reminding.

Petitioners claim to the U.S. Court of Appeals (7th Cir.) that FRCP 12(c) was misapplied by the district court was not reviewed. [See A-2, 1-4] Apparently, either the Court of Appeals did not know if 12(c) was misapplied, or knew 12(c) was misapplied and did nothing. Either way this court should review to explain to all Court of Appeals what FRCP 12(c) means.

a. FRCP 12(c) dismissal decision Conflicts within Seventh Circuit and other circuit decisions.

In this case, the district judge found that "the district court may also take notice of matters of public record. See e.g. *U.S. V Wood*, 925 F 2d, 1580, 1582" to rule on FRCP 12(c) motion. This conflicts with Seventh Circuit decisions and other circuits decisions based on FRCP 12(c). [See A-p4.]

The Respondents in this case filed a Motion for Judgment on the Pleading 12(c). Yet within the motion Respondents argued that the case should be barred due to *res judicata*. Attached to the mislabeled 12(c) motion (actually a motion for summary judgment based on *res judicata*) were four exhibits A-D, which apparently the district judge took judicial notice for purpose of *res judicata*. As the district judge needed to notice the "public record" he found *U.S. V Wood*, 925 F 2d 1580, 1582 as precedent that motions with exhibits outside the pleadings may be utilized in 12(c) ruling.

The district court erred because Rule 12(c) provides that only the pleadings may be used to render judgment. See *Serpico V Menard Inc*. 927 F Supp. 276 (N.D. Ill.) 1996). Cases from other circuits include: *Mixon V Ohio*, 193F 3d 389, 400 (6th Cir.) and *Deravin V Kerik*, 335F 3d, 195, 200 (2d Cir. 2003) and *Ortega V Christian*, 85F 3d 1521, 1524 (11th Cir. 1996). As

many other circuit cases have issues with 12(c) motions a definite ruling from the Supreme Court of the United States appears needed.

b. Respondents' motion should have been converted to summary judgment motion.

Petitioners argue that a motion for judgment on the pleadings should be based on the pleading without extrinsic exhibits outside the pleading to be considered. Those motions should be converted pursuant to Federal Rules of Civil Procedure (FRCP).

3. Res Judicata under Illinois law does not attach to this case.

The district court found that:

"Simonsen's claims against the Board, therefore, are precluded and are dismissed" [See A-4, pg. 8]. Also, "The remaining claims against the individual defendants are precluded and this suit may not proceed [See A-4, pg. 9]. The district court misapplied 28 U.S.C. 1738.

Supreme Court Justice O'Connor wrote in *Massese V American Academy of Orthopedic Surgeons*, 470 U.S. 373, 379"It has long been established that / 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the state from which the judgment is taken."

Illinois Law States:"Where the plaintiff is simultaneously maintaining separate actions based upon parts of the same claim, and in neither action does the defendant make the objection that another action is pending based on the same claim, judgment in one action does not preclude the plaintiff from proceeding and obtaining judgment in the other action the failure of the defendant to object to the splitting of the plaintiffs claim is

effective as an acquiescence in the splitting of the claim." Restatement (second) of judgments / 26, comment a, at 235 (1982).
See *Thurleif Larsen & Son, Inc. V PPG Industries, Inc.*, 177 Ill. App. 3d 656, 662 (1988) (adopting comment a); see also *Page1 V Notbohm*, 186 N.W. 2d 638, 640-41 (Ia. 1971); *Todd V Central Petroleum Co.*, 124 P. 2d 704, 707-08 (Kan. 1942). Where defendant did not raise *res judicata* in either of concurrent cases until one went to judgment, defendant waived *res judicata* defense).
The district court found that Petitioners had split their claims; Respondent failed to object. Pursuant to Illinois law, the defendants waived *res judicata* defense. Therefore, the district court erred dismissing Petitioners' claims. Remand is required under *res judicata* laws of Illinois and justice. A jury needs to hear the petitioner's claims.

To show the district judge erred in attaching *res judicata* are the words of the district judge:"In our order of April 26, 2003, we determined that Simonsen had split his claims, asserting state law claims in state court and federal law claims in federal court. The Seventh Circuit, however, "deprecates the practice of filing two suits over one injury" noting that "[m]ultiplication imposes needless costs on one's adversary, on the judicial system, and on other litigants, who must endure a longer queue." See *Rogers V Desidesio*, 58 F 3d 299, 300 (7th Cir. 1995) to discourage claim-splitting,a plaintiff is entitled to whichever judgment is rendered first, and the second court simply dismisses the case pursuant to the doctrine of claim preclusion, Id." See A-4 pg. 4
Justice O'Connor would not agree with the district court reasoning that "the second court simply dismisses the case pursuant to the doctrine of claim preclusion." 28 U.S.C. / 1738 provides the

command to accept Illinois Law, not Seventh Circuit rulings.

Both the District Court and Court of Appeals, Seventh Circuit misapplied Illinois's *res judicata* under 28 U.S. C 1738. However, Gerald's claim that *res judicata* was a defense which barred his dismissal was arbitrarily rejected by the District Court and the Court of Appeals did not review dismissal of Gerald's claim of *res judicata* precluding his dismissal. Gerald's claim was that the Circuit Court order of November 15, 2000, where a Judge ruled that Gerald being not guilty of misconduct towards the Board had no bearing on the case as the Judge's order from the Cook County Circuit Court under administrative review was "confidential". The District Court erred because court orders under administrative review are not confidential as the public provides the funds to run the courts and the public is entitled to the decisions of the court (*See Pepsico, Inc, v. Redmond, 46 f. 3d 29 31 And see Exhibit No. 5 complaint for administrative review and circuit court order attached hereto.*) In this case, an administrative hearing officer ruled in conflict with the Circuit Court Judge and the Board accepted the hearing officers ruling while rejecting the order of the Cook County Circuit Court. The judge heard a hearing on the merits. The hearing officer only heard the board's case; excluding Gerald's defense.

4. District Court ignored Kremer v. Chemical Construction Corporation 456 U.S. 61, 476 and Illinois Administrative Review.

1. The district court wrote erroneously, "Here, the decision of the Appellate Court of Illinois affirming the decision of the Circuit Court of Cook County is a final judgment rendered by a court of competed jurisdiction." [*See A-4, page 7*].

The Court of Appeals also applies the final judgment to the circuit court writing, "The defendants assume that Simonsen's pending petition did affect the finality of the circuit court's judgment, but they argue that it no longer matters because the petition has been denied and the judgment is now indisputably final.

Both lower courts attach the circuit court's judgment as a final judgment. This is error. This case is an administrative action in the state court. Pursuant to Illinois law the Illinois Appellate Court does not review the circuit court's judgment.

"On appeal we review the administrative agency's decision, not the Circuit Court's determination." *XL Disposal Corp., Inc. v Zehnder*, 304 Ill. App. 3D 202, 207 (1999)

Thus, the District Court, Court of Appeals erred attaching the final judgment to the circuit court's administrative review. The administrative agency's (ISBE) decision based on the administrative record is what the Illinois Appellate Court reviews. To attach *res judicata* the District Court was mandated by 28 U.S. C 1738 federal to first ascertain whether "the law of state in which the prior judgment preclusive effect against the claims asserted in the federal action." *Welch v Johnson*, 907 F 2d 714, 719 (7th Cir. 1990) Citing *Kremer v Chemical*

Construction Corporation 456 U.s. 461, 476) en, the court must determine whether the party had a full and fair opportunity to pursue its claim in the prior state proceeding.

By attaching the final judgment to an administrative review action, the district and the

Court of Appeals failed to ascertain whether petitioners had a full and fair opportunity to pursue their federal claims in the ISBE hearing. Any fair review would find petitioners had no chance to pursue federal claims, as the ISBE excluded any discrimination defense by Petitioner Gerald. See letters with administrative hearing office Hill excluding discrimination defense of Gerald (See A Exhibits 1 and 2) This violated U.S. Court of Appeals *Pirela v Village of North Aurora*, 935 F 2d, 909, 913-14 (7th Cir. 1991).

The district court erred not ascertaining the sham procedures at the ISBE and that Petitioner Gerald was denied an opportunity to pursue his federal claims. On appeal Petitioner Gerald informed the Court of Appeals that the ISBE was where a fair hearing should have been held. But wasn't. As proof that Gerald's federal claims were excluded in state action, Petitioners motion to supplement the federal record with the ISBE record. Respondents objected claiming "the ISBE record was never presented to the district court without the ISBE record the district court was pursuant to 1738 unable to attach *res judicata*.

Without the ISBE administrative record, the Court of Appeals could not attach res judicata to this case (See A-8 which is an order of the Court of Appeals denying Petitioner supplementing the ISBE administrative record. Neither federal lower courts could attach res judicata with knowledge of the ISBE administrative sham proceedings. Sham proceedings violate due process and equal protection.

See *Levenstein v. Salafsky* 164 F 3d 345, 352 citing Olech v. Village of Willowbrook 160 F 3d 386,
387 and *Indiana State Teachers Association v. Bd. Of St. Commissions* 101 F 3d 1179, 1181.

5. District Court and Court of Appeals erred attaching elements of res judicata not relevant in this case

a. No ruling on the merits

Both lower courts erred looking at the circuit court for administrative review as a judgment on the elements. Illinois law requires Ill. App. Court to review administrative action, which neither lower courts looked to see whether Gerald's ISBE hearing provided a full and fair opportunity to pursue his federal claims. On review, the lower courts will find the ISBE hearing was a total sham. The Board admitted administrative record not reviewed by district court (See A-7 & 8)

.b. Same parties or "privity" not relevant

The defendants in the state action were not the same Respondents in the federal action. Except for the Board. However, the ISBE hearing excluded evidence and witnesses proving the Board's discrimination actions against Gerald, so the ISBE action does not attach res judicata to the Board. "Privity" was the District Court's stretch to grant Respondents' motion. The District Court erred citing *Licari v. City of Chicago* 298 F 3d 664, 666 (7th Cir. 2002) because in this res judicata was attached because defendants were supposedly "government" officials. Board employees are not government officials.

c. Identity of causes of action not relevant

The state action was to discharge a tenured teacher for misconduct. The federal claims

were based on the discrimination brought by the Respondents (one and all) to unlawfully take property protected by the United States Constitution 14th Amend., and Illinois law. These causes are not in identity. However, Gerald's defenses to his property well-established under federal and state law, and Supreme Court of the United States decisions were repeatedly and repeatedly violated.

III.) CONCLUSION

For the afore-mentioned reasons Petitioners pray the Petition for a Writ of Certiorari be granted, or that this court grant any relief due petitioners as law and fairness provides.

Respectfully submitted _____

Gerald Simonsen

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St. Charles, IL 60174
No Phone

INDEX TO APPENDIX

Appendix #1	Order of Court of Appeals (7th Cir.), denying *en banc* rehearing on November 17, 2004.
Appendix #2	Unpublished Order of Court of appeals affirming District Court on October 22, 2004.
Appendix #3	District Court denied Petitioner's Motion to Alter of Amended Order of December 23, 2003 on January 5, 2004.
Appendix #4	District Court Order dismissing case of December 23, 2003.
Appendix #5	District Court Order of January 8, 2003, granting Respondent's Motion for Stay.
Appendix #6	Board objected to supplementing record.
Appendix #7	Court of Appeals denied Petitioner's Motion to Supplement ISBE Record.

EXHIBITS TO UNDERSTAND CASE

Exhibit #1	ISBE Hearing Officer ruling excluding discrimination defense December 3, 2000
Exhibit #2	ISBE ruling excluding discrimination defense January 28, 2001
Exhibit #3	Board pre-suspension Hearing Officer excluding discrimination defense Page 24.
Exhibit #4	105 ILCS 5/2-325q - no waivers for tenure.
Exhibit #5	Ill. Administrative Review Complaint & Circuit Court Order (Order was not appealed by Board).

Appendix #1

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 17, 2004

Before

Hon. William J. Bauer, Circuit Judge
Hon. Frank H. Easterbrook, Circuit Judge
Hon. Ilana Diamond Rovner, Circuit Judge

No. 04-1280

Gerald Simonsen, Ilse Simonsen, Paulette Simonsen, et. al.,

Plaintiffs-Appellants,

v.

Chicago Board of Education, Marilyn Johnson, Carol Gearring, et. al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 02 C 3081

Marvin E. Aspen, Judge

ORDER

On consideration of Plaintiff's-Appellants' motion for *en banc* rehearing filed in the above-captioned case, no judge in active service has requested a vote on the petition for rehearing *en banc* and all of the judges on the original panel have voted to deny *en banc* rehearing. It is, therefore, ordered that the motion for *en banc* rehearing is DENIED.

Appendix #2

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Submitted August 31, 2004 - Decided October 22, 2004

Before
Hon. William J. Bauer, Circuit Judge
Hon. Frank H. Easterbrook, Circuit Judge
Hon. Ilana Diamond Rovner, Circuit Judge

No. 04-1280

GERALD SIMONSEN,
Plaintiff-Appellant,

v.

CHICAGO BOARD OF EDUCATION, et. al,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Marvin E. Aspen, Judge

ORDER

Gerald Simonsen, a tenured teacher in Chicago, was twice suspended and eventually terminated by the Chicago Board of Education. He sued the Board and ten of its employees in Federal Court, alleging that the Defendants discriminated against him based on race, gender and age; violated his right to procedural due process in the course of suspending and terminating him; and violated his right to equal protection by singling him out for discipline. Simonsen, a pro se litigant, also named his mother, ex-wife, and two daughters as Co-Plaintiffs. In a series of Orders the District Court dismissed all of the claims against all of the Defendants, and Simonsen appeals. We affirm.

* After an examination of the briefs and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. See Fed. R. App. P. 34(a)(2).

In April and June, 1999, the Board gave Simonsen several warnings regarding his work performance, noting his failure to submit lesson plans, his pattern of excessive absences and tardiness, and his inappropriate dress. The Board suspended Simonsen for 15 days in October, 1999. A month later the then-Chief Executive Officer of the Chicago Public Schools, Paul Vallas, sought to terminate Simonsen. In December, 1999, Simonsen was suspended without pay. Simonsen's termination hearing commenced in June, 2000. After hearing 15 days of testimony, the hearing officer issued a recommendation to terminate Simonsen, and the Board adopted his recommendation. Simonsen filed an appeal to the Circuit Court of Cook County, arguing that the Board erred in terminating him. After reviewing the record the Circuit Court upheld the Board's decision.

Meanwhile, with the Circuit Court proceeding still pending, Simonsen filed this lawsuit. In November, 2001, the District Court dismissed Simonsen's ex-wife, mother and two daughters from the Complaint, reasoning that they lacked standing to pursue his claims. Then in February, 2002, the District Court dismissed five of Simonsen's ten counts, and dismissed several of the remaining counts as to particular Defendants. The Court also denied Simonsen's Motion for a Default Judgment against two of the Defendants because he did not present evidence that they had been served. Simonsen then filed a Motion to Stay Discovery pending the outcome of the State-Court review of the Board's termination decision. The District Court had not previously been aware of the State proceeding. The Court granted the stay request, but warned Simonsen that he must present his federal claims to the State Court, or they would be barred under the doctrine of claim preclusion.

After the Circuit Court upheld the Board's decision, the District Court set a briefing schedule, but granted another stay when it learned that Simonsen had filed a timely notice of appeal to the Court of Appeals of Illinois. In September, 2003, the Appellate Court

affirmed the Circuit Court's decision; the federal Defendants then moved for judgment on the pleadings. Simonsen opposed the motion; he argued that it was premature and attached his Affidavit of Intent to

File Leave to Appeal that was dated November 5, 2003. The District Court held that Simonsen's claims were precluded by the State-Court judgment, erroneously believing that Simonsen had failed to petition the Supreme Court of Illinois for leave to appeal within the required 21-day time period, and that the Circuit Court's judgment was thus final. On December 30, 2003, Simonsen moved to alter or amend the District Court's Order, alleging that in fact he had timely filed his petition for leave to appeal. Simonsen did not advise the Court that he had filed a motion to reconsider the Appellate Court's decision and thus his petition for leave to appeal was timely. The District Court denied the motion to alter or amend. The Supreme Court of Illinois denied Simonsen's petition for leave to appeal on January 28, 2004, and denied his motion to reconsider the denial of his petition on March 30, 2004.

On appeal Simonsen first argues that the District Court erred when it prematurely dismissed his complaint on claim preclusion grounds. Federal Courts must give State-Court judgments the same preclusive effect that they would have in State Court. See 28 U.S.C. 1738; *Licari v. City of Chicago*, 298 F 3d 664, 666 (7th Cir. 2002). Under Illinois law, in order for res judicata to apply to Simonsen's Federal claims, the following three requirements must be satisfied: (1) the State-Court decision must have involved the same parties or their privies; (2) the State-Court decision must have constituted the same cause of action as the current claims; and (3) the State Court must have reached a final judgment on the merits. See *Garcia v. Village of Mount Prospect*, 360 F. 3d 630, 635 (7th Cir. 2004); *Bajwa v. Metropolitan Life Ins. Co.*, 804 N.E. 2d 519, 532 (2004).

There also exists an identity of causes of action. In determining whether such an identity exists, we apply Illinois's "transactional" test. *See Id.* Under the transactional test different theories of relief constitute a single cause of action for purposes of res judicata "if a single group of operative facts gives rise to the assertion

of relief." *Id.* (citing *River Park, Inc. v. City of Highland Park*, 703 N.E. 2d 83, 893 (1998). Because Simonsen's federal claims all arise from the actions of the Board and its Defendant employees in

connection with his suspension and dismissal, the federal claims constitute the same cause of action as was litigated in the Circuit Court. *See Garcia*, 360 F. 3d at 637 (citing *River Park Inc.*,, 703 N.E.2d at 893); *Licari*, 298 F. 3d at 667; *see also Rogers v. Desiderio*, 58 F.3d 299, 301 (7th Cir. 1995) (explaining that, although the Circuit Court uses the administrative record to perform its review, "a party aggrieved by an agency's decision may join a claim under 42 U.S.C. 1983, and obtain decision of the constitutional issue on an expanded record.").

Finally, as to the third element, Simonsen argues that, because his petition for leave to appeal to the Supreme Court of Illinois was still pending when the District Court entered its final judgment, the State-Court judgment was not final and so claim preclusion did not apply. The Illinois Supreme Court has not specifically addressed whether a pending petition for leave to appeal affects the finality of a judgment for purposes of claim preclusion. *See Rogers*, 58 F.3d at 302. The State Supreme Court has held that the filing of an appeal in the intermediate Appellate Court suspends the collateral estoppel effect of a Circuit Court's judgment, *See Ballweg v. Springfield*, 49 N.E.2d 1373, 1375 (Ill. 1986), and several Illinois appellate Courts have extended *Ballweg* to claim preclusion, *see Rogers*, 58 F.3d at 302. The Illinois Courts have not yet addressed whether a pending petition for leave to appeal likewise suspends the preclusive effect of a judgment, although the Court in *Ballweg* explained that "finality requires that the potential for appellate review must have been exhausted." 499 N.E.2d at 1375. The Defendants assume that Simonsen's pending petition did affect the finality of the Circuit Court's judgment, but they argue that it no longer matters because the petition has been denied and the judgment is now indisputably final. We agree. Remanding the case would not change the outcome. *See People v. Condon*, 615 N.E.2d 802, 804 (Ill. App. Ct. 1993) (declining to remand where prior judgment became final after appeal had been filed).

Finally, Simonsen objects to the District Court's interim orders dismissing various counts and defendants from his complaint for reasons other than claim preclusion. But because these claims are also precluded, we do not need to address them individually.

The District Court's judgment is AFFIRMED.

The Defendants' motion to strike documents from appendix and motion to correct Defendants' motion to strike documents from appendix are DENIED.

Appendix #3

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge	Marvin Aspen	Sitting Judge if Other
CASE NUMBER	01 C 3081	DATE 1/5/2004
CASE TITLE	Gerald Simonsen v. Board of Education of City of Chicago, et. al.	

MOTION:

DOCKET ENTRY:

(1) ☐ Filed motion of (use listing in "Motion" box above.)

(2) ☐ Brief in support of motion due _____.

(3) ☐ Answer brief to motion due ____. Reply to answer brief due _____.

(4) ☐ Ruling/Hearing on ___ set for ___ at ____.

(5) ☐ Status hearing (held/continued to) (set for/re-set for) on ____ set for _____ at _____.

(6) ☐ Pretrial conference (held/continued to) (set for/re-set for) on ____ set for ____ at.

(7) ☐ Trial (set for/re-set for) on _____ at _____.

(8) ☐ (Bench/Jury trial) (Hearing) held/continued to ____ at _____.

(9) ☐ This case is dismissed (with/without) prejudice and without costs (by/agreement/pursuant to) ☐ FRCP4(m) ☐ Local Rule 41.1 ☐ FRCP4(a)(1) ☐ FRCP4 (a)(2).

(10) X (Other docket entry) Plaintiff's motion to alter or amend (126-1 & 126-2) the Order of 12/23/03 which dismissed Plaintiff's case is denied.

Appendix #4

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GERALD SIMONSEN,	)	
	)	
Plaintiff,	)	
v.	)	Case No. 01 C 3081
BOARD OF EDUCATION OF	)	
THE CITY OF CHICAGO, et. al.	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, District Judge:

Presently before us is Defendants' Motion for judgment on the pleadings, filed pursuant to Federal Rule of Civil Procedure 12(c). For the reason set forth below, we grant Defendants' Motion.

Background

Plaintiff Gerald Simonsen, a tenured teacher in the Chicago Public Schools, was twice suspended and eventually dismissed by the Board of Education of the City of Chicago ("Board"). Simonsen has been employed by the Board since 1977, most recently at Hendricks Academy. In April, 1999, he received a "Warning Resolution" about deficiencies in his performance as a teacher dating back to 1997. *See* Compl. Ex. 1. The warning cautioned that failure to correct the deficiencies could result in dismissal. Simonsen disputed the issuance of the warning, claiming that the charges were baseless, but the Board did not withdraw the charges.

In May, 1999, Carol Gearring, the principal of Hendricks Academy, recommended that Simonsen be suspended for fifteen days without pay for disciplinary problems. Simonsen claims that

Gearring's recommendation was in retaliation for a complaint he filed with the EEOC in 1998 and for his membership on the Hendricks Local School Council, which had given Gearring a poor performance review. Simonsen appealed his suspension and filed a grievance against Gearring. A conference on both matters was held on September 2, 1999, with Defendant Cheryl Nevins, an employee of the Bureau of Labor and Employee Relations of the Chicago Pubic Schools, serving as the hearing officer. Simonsen alleges that this hearing was a sham because the decision to suspend him had been made prior to the hearing. Shortly hereafter, Simonsen received letters from Defendant Paul Vallas, the Chief Executive Officer of the CPS, denying his grievance, and Defendant Carlos Ponce, the Chief Human Resources Officer of the CPS, denying the appeal of the suspension. Simonsen served the fifteen day suspension in October, 1999.

Meanwhile, in June, 1999, the Board issued a second Warning Resolution. Gearring recommended that Simonsen be dismissed and Defendant Marilyn Johnson, the Director of the CPS Law Department, began to prepare for his dismissal. Simonsen claims that Johnson and Vallas approved the issuance of a second Warning Resolution as a pretext for his termination. Simonsen informed the Board, with Vallas, Johnson, and Defendant Jose Rodriguez* in attendance, that the charges were false and that Gearring was retaliating against him, but the Board did not withdraw the second warning.

On November 3, 1999, the day after his fifteen day suspension ended, Rodriguez sent a representative to remove him from the premises. On November 12, 1999, Vallas approved dismissal charges against Simonsen, notified him of his right to a pre-suspension hearing, and tentatively scheduled a dismissal hearing for December 6, 1999, *See* Comp 43; Compl. Ex. 5. A pre-suspension hearing was

held on November 30, 1999, with Defendant Sharon Bailey, an employee of the Bureau of Labor and Employee Relations,

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* It is not disputed that Rodriguez is a Regional Education Officer.

serving as the hearing officer. Simonsen contends that the hearing was a sham, that the charges were not explained to him as required by Board policy, that he was not allowed to testify or present written evidence, and that Bailey was not impartial because she worked for Vallas and she had contact with Gearring prior to the hearing. On December 6, 1999, Simonsen was suspended without pay pending his dismissal hearing.

The dismissal hearing commenced on June 26, 2000, under the direction of Illinois State Board of Education Hearing Officer Marvin Hill. Defendants Karina Ayala-Bermejo and James Ciesel, attorneys employed by the Board, were assigned to prosecute Simonsen's dismissal hearing. Simonsen maintains that the prosecutors knew or should have know that false testimony was being given, but that they did nothing about it. Moreover, Simonsen claims that Bermejo gave false information to Hill. Simonsen also blames the Board and Vallas for delays in the commencement and completion of the hearing. Finally, Simonsen charges that the dismissal hearing was a farce. *See* Compl. Ex 1 at 2. On November 15, 2001, Hill issued a report recommending that Simonsen be dismissed. On December 19, 2001, the Board accepted Hill's recommendation and dismissed Simonsen. Simonsen sought administrative review of his dismissal in the Circuit Court of Cook County. *See* 105 ILCS 5/34-85b (providing for judicial review of teacher dismissals under the Administrative Review Law, 735 ILCS 5/3-101 *et seq*.

Simonsen also sued the Board and a number of its employees (collectively, "Defendants") in Federal Court, alleging racial, sexual, and age discrimination as well as a variety of due process violations which allegedly occurred during his suspension and dismissal hearings*.

* The Defendants in this federal action include the Board; Paul Vallas, Marilyn Johnson, Carol Gearring, Jose Rodriguez, Cheryl Nevins, Sharon Bailey, Gwen Smith, Carlos Ponce, Karina Bermejo (sic) and James Ciesel. Defendants Vallas, Smith and Ponce have not responded to the Complaint.

In the federal action, Defendants filed motions to dismiss and Simonsen filed motions for default judgment against two Board employees. In our opinion of February 13, 2002, we granted in part and denied in part the motions to dismiss and we denied the motions for default judgment.* Simonsen then filed a motion to stay discovery pending the outcome of Simonsen's state administrative law claim. In our order of April 26, 2002, we determined that Simonsen had split his claims, asserting state law claims in State Court and federal law claims in Federal Court. The Seventh Circuit, however, "deprecates the practice of filing two suits over one injury, "noting that (m)ultiplication imposes needless costs on one's adversary, on the judicial system, and on the litigants, who must endure a longer queue." *See Rogers v. Desiderio*, 58 F.3d 299, 300 (7th Cir. 1995). To discourage claim-splitting, a plaintiff is entitled to whichever judgment is rendered first, and the second Court simply dismisses the case pursuant to the doctrine of claim preclusion. *Id.* Therefore, we granted Simonsen a stay pending the completion of the state administrative review process.**

*Specifically, claims against Defendants Ciesel and Bermejo were dismissed in their entirety. We dismissed all of the claims against Defendants Johnson, Bailey, Nevins and Rodriguez except Count III (1983). We dismissed all counts except III and IV against Defendant Gearring, and dismissed counts II-III, VII-IX against the Board. We did not address the issue of whether to grant a stay at the time because neither party informed this Court prior to the issuance of its February 13, 2002 opinion that an administrative review of Simonsen's dismissal was pending.

** In our prior order, we urged Simonsen that in light of the stay, "if he wants to pursue his federal claims, he *must* present them to the *State Court* now presiding over his administrative review." As we explained in our order, the Seventh Circuit noted in *Rogers*, "(f)ederal courts employ a number of devices to give state judges the primary responsibility for supervising the state administrative process, so in

many cases...a litigant who wants to present both state and federal objections is as a practical matter driven to the state forum." *Rogers*, 58 F.3d at 301. We explained

> Simonsen will be able to present his claims to the State Court if he so chooses. The State Court has subject matter jurisdiction over this federal claims brought pursuant to 42 U.S.C. 1983, and Title VII. *See Rogers*, 58 F.3d or 301. Furthermore, Illinois law permits amendment to pleadings "(a)t any time before final judgment...on just and reasonable terms," even if the amendment "chang(es) the cause of action or defense or add(s) new causes of action or defenses." 735 ILCS 5-2-616(a), *quoted in Hearne v. Bd. of Educ. of the City of Chicago*, 185 proceeding).

In early Fall, 2002, the Circuit Court of Cook County, after written and oral argument, made findings of fact and law upholding the dismissal recommendation.*

F 3d 770, 777 (7th Cir. 1999). If he fails to bring his federal claims before the State Court, and if the State Court issues a judgment against him on the merits of his state law claims, he will be *precluded* from bringing his federal law claims in this Court. *See Rogers*, 58 F.3d at 300. However, "if the state case should break down in a way that avoids the preclusive effect of the judgment, the plaintiff would be entitled to a decision on the merits from the Federal Court." *Id.* at 302, and for this reason we have stayed the federal case rather than dismiss it.

See Simonsen v. Bd. of Educ. of the City of Chicago, No. 01-C-3081 (N.D.Ill. Apr. 26, 2002).

*The Defendants named in the caption of the State Court proceedings were the Board, Arne Duncan, Chief Executive Officer of the CPS, the Illinois State Board of Education, and Marvin Hill, Jr., hearing officer.

See Simonsen v. Bd. of Educ. of the City of Chicago, No. 1-02-3205 (Ill. App. Ct. Sep. 25, 2003).

Following the issuance of an opinion from the Appellate Court of Illinois, Defendants moved for judgment on the pleadings in the instant action.* Simonsen filed a response, arguing that Defendants' motion for judgment on the pleadings was premature because his State Court proceedings are still pending. To evidence the ongoing nature of his state claims, Simonsen attached to his response an Affidavit of Intent to File Leave to Appeal that he apparently filed on November 5, 2003, in the Appellate Court of Illinois. However, Simonsen did not seek leave to appeal to the Supreme Court of Illinois within the requisite twenty-one day time period. *See* Ill. Sup. Ct. R. 315. The Affidavit of Intent Simonsen filed was not timely either. Pursuant to Illinois Supreme Court Rule 315(b), Simonsen must file an Affidavit of Intent to file a petition for leave within the same twenty-one day period after the entry of judgment of the Appellate Court, which he did not do. *Id.*. Because Simonsen has failed to timely and properly appeal the order of the Appellate Court of Illinois," ** the judgment of that Court is final and Defendants' motion for judgment on the pleadings is ripe for adjudication.

Standard of Review

Federal Rule of Civil Procedure 12(c) allows a party to move for judgment in its favor after the parties have filed the complaint and

*The Board of Education of the City of Chicago joined individual Defendants' motion for judgment on the pleadings.

**As set forth in our minute order dated October 17, 2003, Simonsen was to file his response to Defendants' 12(c) motion on October 24, 2003. Without leave of this Court, Simonsen filed his response on November 13, 2003, three weeks after it was due to be filed.

answer. *Northern Indiana Gun & Outdoor Shows, Inc. v. South Bend*, 163 F.3d 449, 452 (7th Cir. 1998.) A motion for judgment on the pleadings may only be granted if no marital issues of fact remain to be resolved between the parties and the movant is entitled to judgment as a matter of law. *National Fidelity Life Ins. Co. v. Karaganis*, 811 F.2d 357, 368 (7th Cir. 1987). Unlike a summary judgment motion, Rule 12(c) permits us only to consider the pleadings and any written instruments attached as exhibits. *Northern Indiana Gun*, 163 F.3d at 452. The District Court may also take judicial notice of matters of public record. *See* e.g *U.S. v. Wood*, 925 F.2d 1580, 1582 (7th Cir. 1991). The burden of establishing the absence of a material issue of fact, however, falls on the movant and we are obligated to view the facts in the light most favorable to the non-moving party. *Northern Indiana Gun*, 163 F.3d at 452.

Discussion

Defendants claim that this Court is precluded from hearing Simonsen's claims under the doctrine of *res judicata*. Federal Courts must give State Court judgments the same preclusive effect that they would have in State Court. *See* U.S.C. 1738, *Licari v. City of Chicago*, 298 F.3d 664, 666 (7th Cur. 2002) (Citing *Parsons Steel Inc. v. First Alabama Bank*, 474 U.S. 518, 519 (1986). In determining the preclusive effect of a prior State Court judgment on federal litigation, we look to the rendering state's preclusion law. *Rogers v. Desiderio*, 58 F.3d 299-300-01 (7th Cir. 1995). Under Illinois law, the doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction is conclusive as to the rights of the parties and their privies and constitutes an absolute bar to a subsequent action involving the same claim, cause of action, or

demand as to the same parties. *Licari*, 298 F.3d at 666 (citing *Nowak v. St. Rita High Sch.*, 197 Ill.2d 381, 389, 757 N.E.2d 471,477 (2001). In Illinois, *res judicata* applies where: (1) a final judgment on the merits was rendered by a court of competent jurisdiction; (2) there is an identity of causes of action; and (3) there is an identity of parties or their privies. *Id.* (citing *Nowak v. St. Rita High Sch.*, 197 Ill.2d at 389). *Res judicata* will not apply if plaintiff was not allowed a full and

fair opportunity to litigate his claim in State Court. *Pirela v. Village of North Aurora*, 935 F.2d 909, 911 (7th Cir. 1991).

Here, the decision of the Appellate Court of Illinois affirming the decision of the Circuit Court of Cook County is a final judgment rendered by a court of competent jurisdiction. There also is an identity of the causes of action. Illinois uses the "transactional" test to determine whether identity is present. *See River Park, Inc. v. City of Highland Park*, 184 Ill.2d 290, 310, 703 N.E.2d 883, 893 (1998). The transactional test provides that different theories of relief that rely on a single group of operative facts constitutes a single cause of action for *res judicata* purposes. *Licari*, 298 F.3d at 667. *Res judicata* applies not only to issues actually decided by the State Court, but also to issues that could have been decided by the State Court. *Id see also River Park, Inc.*, 184 Ill.2d at 302.

Although Title VII and 1981 and 1983 claims remain in Simonsen's federal action, those challenges were either raised or could have been raised in the State Court proceedings. Indeed, Simonsen's prior State Court claims and the claims raised in this federal action all stem from Simonsen's suspension, termination, and the decision-making process and procedures relating to his suspension and termination. Because under the transactional analysis "separate claims will be considered the same cause of action for purposes of *res judicata* if they arise from a single group of operative facts, regardless of whether they assert different theories of relief, "*River Park*, 184 Ill.2d at 311, there is an identity of causes of action here. *See e.g., Pirela v. Village of North Aurora,* 935 F.2d 909,910, 912 (7th Cir. 1991) (determining that plaintiff's action is barred under the

transactional approach because his Title VII and 1981 claims in Federal Court and the possible defense he had in State Court arose from the same operative facts -- his misconduct and procedures relating to his suspension and termination -- as his claim in State Court contending that the Board's decision was against the manifest weight of the evidence); *see also Durgins v. City of East St. Louis*, 272 F.3d 841, 843 (7th Cir. 2001) (explaining that in State Court, Plaintiff "could

have argued not only that the Board acted on insufficient evidence, or used improper procedures, but also that the city initiated the discharge proceedings in retaliation for protected speech "and that the Seventh Circuit has held that "an administrative-review action forecloses any later 1983 action in Federal Court arising out of the same transaction").

Finally, there is no question that the Board named as a party in both the state and federal cases, meets the final element of *res judicata*. Simonsen's claims against the Board, therefore, are precluded and are dismissed. Moreover, Simonsen's addition of Board employees as Defendants in the federal suit in their individual and official capacities does not prevent the application of *res judicata* in this action. Recently, the Seventh Circuit discussed privity in a case of an injured police officer who was denied disability benefits by a Retirement Board of the Policemen's Annuity and Benefit Fund of the City of Chicago, *Licari*, 298 F.3d at 665-66. The plaintiff sought review of the Board's decision in State Court. Following the conclusion of the state proceedings, plaintiff sued the City of Chicago and individual Retirement Board members in Federal Court under 1983. *Id.* at 667. The Seventh Circuit recognized that under Illinois law, "a government and its officers are in privity for purposes of *res judicata*." *Licari* 298 F.3d at 667 (citing *Mandarino v. Pollard*, 718 F.2d 845, 850 (7th Cir. 1983), *cert. denied*, 409 U.S.830 (1984)*

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*Privity is indeed "an elusive concept." *In the Matter of L & S Industries, Inc.*, 989 F.2d 929, 932--33 (7th Cir. 1993). In 1983, the Seventh Circuit held that under Illinois law, a government and its officers are in privity for *res judicata* purposes. *Mandarino v. Pollard*, 718 F.2d 845, 850 (7th Cir. 1983), *cert. denied*, 409 U.S. 830 (1984). Then, in 1990, the Seventh Circuit, presented with a city mayor who had been sued in his official and individual capacity in Federal Court (who was not a party to the State Court action), stated

that Illinois law was clear that the mayor in his official capacity was in privity with the city. It was not clear in that case, however, that the mayor in his individual capacity was in privity with the city. *Charles Koen & Assoc. v. City of Cairo*, 909 F.2d 992, 999 (7th Cir. 1990). Instead, the Seventh Circuit refrained from ruling on the individual capacity issue because there was an alternative ground for affirming the District Court's dismissal. However, the Seventh Circuit did drop a footnote, stating that "although one case from this circuit appears to have held that, under Illinois law, a city officer who is sued under section 1983 in his individual capacity was in privity with the city for *res judicata* purposes, (citing *Mandarino*), it is not clear that the Illinois cases cited in *Mandarino* stand for this precise proposition." *Id.* at 999 n.7 (citations omitted); *see also Davis v. City of Chicago*, 53 F.3d 801, 803-04 (7th Cir. 1995) ("(w)e have since questioned whether *Mandarino* correctly captured the way Illinois uses the "privity" concept in the law of preclusion. The gradations in state law are not easy to perceive.") In 2002, however, the Seventh Circuit published *Licari,* which acknowledged, "We have recognized that under Illinois law a government and its officers are in privity for purposes of *res judicata,*" (citing *Mandarino).* The Seventh Circuit then held that plaintiff's addition of Board members as defendants in their individual and official capacities does not prevent the satisfaction of the privity element of *res judicata. Licari*, 298 F.3d at 667. In sum, although the case law is less than clear, we will follow *Licari* as it is the most recent pronouncement by the Seventh Circuit on the issue.

Thus, the Seventh Circuit explained that the addition of members of a Retirement Board in their individual and official capacities to a

federal suit did not prevent satisfaction of the privity clement of *res judicata.*

In *Licari*, the Seventh Circuit determined that a finding of privity between the Retirement Board and the Board members was especially warranted because the plaintiff did not allege any action taken against him by the defendants that was distinct from the actions taken by the Retirement Board. *Id.* Here, the allegations made against the individual Defendants are not distinct from the allegations made against the Board in the state suit. As discussed above,

claims challenge the decision-making process and the procedures relating to his suspension and termination. Because the individual Defendants in this case have a sufficiently close identity of interests with the Board, and under Illinois law a governmental body and its officers and agents are in privity, the remaining claims against the individual Defendants are precluded and this suit may not proceed. *See In the Matter of L & S Industries, Inc.*, 989 F.2d 929,, 932-33 (7th Cir. 1993) ("privity is an elusive concept. It is a descriptive term for designating those with a sufficiently close identity of interests").

Conclusion

For the foregoing reasons, Defendants' motion for judgment on the pleadings is granted and this case is dismissed. It is so ordered.

Marvin E. Aspen
United States District Judge

Dated: 12/23/03

Appendix #5

United States District Court, Northern District of Illinois

Name of Assigned Judge MARVIN ASPEN Sitting Judge if Other

CASE NUMBER **01 C 3081** **DATE** 1/8/2003

CASE TITLE Simonsen, et al vs. Chicago Bd. of Ed.

MOTION

DOCKET ENTRY:

(1) ☐ Filed motion of (use listing in "Motion" box above.)
(2) ☐ Brief in support of motion due _____.
(3) ☐ Answer brief to motion due ____. Reply to answer brief due _____.
(4) ☐ Ruling/Hearing on ____ set for ____ at ____.
(5) ☐ Status hearing (held/continued to) (set for/re-set for) on ___ set for ____ at _____.
(6) ☐ Pretrial conference (held/continued to) (set for/re-set for) on _____ set for _____ at _____.
(7) ☐ Trial (set for/re-set for) on _____ at _____.
(8) ☐ (Bench/Jury trial) Hearing) held/continued to _____ at _____.
(9) ☐ This case is dismissed (with/without) prejudice and without costs (by/agreement/pursuant to) ☐ FRCP4(m) ☐ Local Rule 41.1 ☐ FRCP4(a)(1) ☐ FRCP(a)(2).
(10) X (Other docket entry) After a careful consideration of the factors counseling in favor and against our exercise of jurisdiction, we believe that " the desirability of avoiding piecemeal litigation" in this case justifies a stay. Defendants' motion to stay proceedings pending plaintiff's appeal (109-1 is granted.

Appendix #6

No. 04-1280

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GERALD SIMONSEN,)
Plaintiff/Appellant,)
)
v.)
)
CHICAGO BOARD OF EDUCATION,)
PAUL VALLAS, MARILYN JOHNSON,)
CAROL GEARRING, JOSE RODRIGUEZ,)
CHERYL NEVINS, SHARON BAILEY,)
GWEN SMITH, CARLOS PONCE,)
KARINA BERMEJO and JAMES CIESIL,)
Defendants/Appellees.) Marvin Aspen, Judge

Defendant's Response to
Plaintiff's Motion to Supplement the Record on Appeal

Defendants, Chicago Board of Education (Board), Marilyn Johnson, Carol Gearring, Jose Rodriguez, Cheryl Nevins, Sharon Bailey, Gwen Smith, Carlos Ponce, Karin Bermejo and James Ciesil (collectively, Defendants), by the Board's General Counsel, Ruth M. Moscovitch, ask this Court to deny the Motion to Supplement the Record on Appeal (Motion), which Plaintiffs filed on July 16, 2004, and in support of this request, state:

1. Plaintiffs have appealed an award of judgment on the pleadings to Defendants. This appeal has been fully briefed since June 7, 2004.

2. On July 16, 2004, Plaintiffs sought to supplement the record on appeal with the administrative record complied in proceedings before an Illinois State Board of Education (ISBE)

hearing officer on the Board's request to discharge Plaintiff Gerald Simonsen as a tenured teacher.

3. Plaintiffs filed a similar motion in the District Court on June 14, 2004. As of July 27, 2004, that motion was pending.

4. Defendants ask this Court to deny the Motion to supplement because the ISBE record was never presented to the District Court. Federal Rule of Appellate Procedure 10(a) provides that the record on appeal shall consist of the original papers and exhibits filed in the District Court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the district clerk. Fed. R. App. P. 10(a).

5. Federal Rule of Appellate Procedure 10(e) sets out the procedure for correcting the record. This Court has explained that "(t)he purpose of Rule 10(e) is to ensure that the record on appeal accurately reflects the proceedings in the trial court (thereby allowing us to review the decision that the trial court made in light of the information that was actually before it), not to enable the losing party to add new material to the record in order to collaterally attack the trial court's judgment." *United Sates v. Elizalde-Adame*, 262 F.3d 637, 641 (7th Cir. 2001). That rule does not give this Court authority to admit a document that was not made part of the record in the District Court. *United States v. Hillsberg*, 812 F.328, 336-37 (7th Cir. 1987). *See also United States v. Phillips*, 914 F.2d 835, 840 (7th Cir. 1990) ("An appellant may not attempt to build a new record on appeal to support his position with evidence that was never admitted in the court below.")

6. In the alternative, Defendants ask this Court to deny the Motion because Plaintiffs appear to be asking this Court to review the Illinois appellate order (*see e.g.,* 8 of the Motion). This request is foreclosed by the *Rooker-Feldman* doctrine, which "requires a party seeking review of a state court judgment or presenting a claim that state judicial proceeding has violated their constitutional rights to pursue relief through the state court system and ultimately to the

Supreme Court." *Long v. Shorebank Dev. Corp.*, 182 F.3d 548, 554 (7th Cir. 1999).

7. Plaintiffs recently filed a petition for writ of certiorari, asking the United States Supreme Court to review the Illinois Appellate Court's decision to uphold Gerald Simonsen's termination. The Board did not receive a copy of the notice of filing, but received a copy of the petition on or about July 23, 2004.

For the foregoing reasons, Defendants ask this Court to deny Plaintiffs' motion to supplement the record.

Respectfully submitted,

Ruth M. Moscovitch, General Counsel
Chicago Board of Education

By:_____
One of her Assistants

Appendix #7

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 28, 2004

By the Court:

GERALD SIMONSEN, ILSE SIMONSEN, PAULETTE SIMONSEN, et. al.,	) Appeal from the
	) United States
	) District Court
Plaintiff-Appellants,	) for the Northern
	) District of
No. 04-1280	) Illinois, Eastern
v.	) Division.
CHICAGO BOARD OF EDUCATION, MARILYN JOHNSON, CAROL GEARRING, et. al.,	)
	) No. 01 C 3081
Defendants-Appellees.	)
E.	) Marvin
	) Aspen, Judge.

The following are before the court:

1. MOTION TO SUPPLEMENT RECORD, filed on July 16, 2004, by the pro se appellant.

2. DEFENDANTS RESPONSE TO PLAINTIFF'S MOTION TO SUPPLEMENT THE RECORD ON APPEAL, filed on July 27, 1004, by counsel for the appellee.

IT IS ORDERED that the motion is DENIED.

Exhibit #1

December 3, 2000

Karina Ayala-Bermejo
Chicago Board of Education
125 South Clark, Ste. 700
Chicago, Illinois 60603

Gerald Simonsen
2922 North Kenosha
Chicago, Illinois 60641

Dear Ms. Simonsen and Ms. Ayala:

As the parties know, I have been providing my copies of the transcripts for Mr. Simonsen's inspection. I want to make clear that the transcript is to be returned to me once Mr. Simonsen has had the opportunity to examine it for errors. Since his union had refused to purchase a copy for his use, I see no other fair alternative than for me to loan him my copies. These copies must be returned to me (hopefully unmarked) as soon as Mr. Simonsen has had an opportunity to examine them for errors. He is not being provided a transcript to otherwise assist him in his case.

On another matter, I am ordering Mr. Simonsen to focus his direct examination on the specifications outlined in the Board's notice of charges. To this end, I am requesting that any witness called by Mr. Simonsen, or the Board in rebuttal, testify to his or her direct knowledge of the charges outlined in the specifications. Most of the charges are "one-on-one" situations, so unless a witness was there, observing first hand the events between Simonsen and Principal Geering, no purpose is served in calling such a witness. Any testimony not related to a specification outlined, or Mr. Simonsen's theory that he was somehow the object of discriminatory treatment by the principal, will be excluded. I trust both parties will be diligent in presenting witnesses consistent with this ruling.

As the parties know, we have had 12 days of hearing, with the Board completing its case in chief in four (4). At our next meeting we

will come to some conclusion regarding a date certain for ending the hearings by the end of February, 2001.

Very truly yours,

Marvin Hill, Jr.

Exhibit #2

January 28, 2001

Karina Ayala-Bermejo
Chicago Board of Education
125 South Clark, Ste. 700
Chicago, Illinois 60603

Gerald Simonsen
2922 North Kenosha
Chicago, Illinois 60641

Dear Mr. Simonsen and Ms. Ayala:

In response to Mr. Simonsen's letter of January 23, 2001, I repeat the following:

> **I am ordering Mr. Simonsen to focus his direct examination on the specifications outlined in the Board's notice of charges. To this end, I am requesting that any witness called by Mr. Simonsen, or the Board in rebuttal, testify to his or her direct knowledge of the charges outlined in the specifications.** Most of the charges are "one-on-one" situations, so unless a witness was there, observing first hand the events between Simonsen and Principal Geering, no purpose is served in calling such a witness. Any testimony not related to a specification outlined, or Mr. Simonsen's theory that he was somehow the object of discriminatory treatment by the principal, will be excluded. I trust both parties will be diligent in presenting witnesses consistent with this ruling.

My time and the taxpayers' money is not a free good. This matter will be concluded within a reasonable length of time.

As the parties know, we have had 12 days of hearing, with the Board completing its case in chief in four (4). Mr. Simonsen will have roughly the same amount of time to conclude his defense.

I will tentatively set February 6th as our next day of hearing, 9:30 a.m. at the Board of Education's offices.

Very truly yours,

Marvin Hill, Jr.

Exhibit #3

THE HEARING OFFICER: You know what, Mr. Simonsen, let me stop you right there. What you need to do is give me any information that you have regarding the charges and not your personal opinion about a principal that's not here to defend herself as well. I will have that stricken from the record.

THE WITNESS: It is not a personal opinion?

THE HEARING OFFICER: Mr. Simonsen, if you want to continue with 8B, then fine, but we're only dealing with the charges and specifications here.

Exhibit #4

105 ILCS 5/2-3.25g

5/2-3.25g Waiver or modification of mandates within the School Code and administrative rules and regulations

2-3.25g Waiver or modification of mandates within the School Code and administrative rules and regulations. Notwithstanding any other provisions of this School Code or any other law of this State to the contrary, school districts may petition the State Board of Education for the waiver or modification of the mandates of this School Code or of the State Board of Education. Waivers or modification of the mandates of this School Code or of the administrative rules and regulations promulgated by the State Board of Education. Waivers or modifications of administrative rules and regulations and modifications of mandates of this School Code may be requested when a school district demonstrates that it can address the intent of the rule or mandate in a more effective, efficient, or economical manner or when necessary to stimulate innovation or improve student performance. Waivers of mandates of the School Code may be requested when the waivers are necessary to stimulate innovation or improve student performance. Waivers may not be requested from laws, rules and regulations pertaining to special education, teacher certification, or teacher tenure and seniority.

Exhibit #5

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT - LAW DIVISION

GERALD SIMONSEN,
Plaintiff,

v. No. 00 L 50817

ILL. DEPT. OF EMPLOYMENT SECURITY, et. al.,
Defendants.

ORDER

This matter comes before the court for judicial review of a decision of the Board of Review dated July 24, 2000, which found that plaintiff was discharged for misconduct and was not, therefore, entitled to unemployment benefits. Plaintiff was placed on a 15-day suspension at the end of the school day on October 12, 1999. The principal asked him for his grade book and attendance book as he was leaving school. Plaintiff hurried back to his classroom but was able to only locate his attendance book. The lack of a grade book coupled with plaintiff's untimely suspension prevented the school from transmitting grades at the parent conferences set for November 3, 1999. During oral argument plaintiff stated that he subsequently found his grade book at home. There is no evidence that the principal requested that plaintiff send in the grades during his suspension. The Board held that the failure of the plaintiff to have his grade book immediately available at the time of his unforeseen suspension constitutes misconduct.

The main purpose of the Unemployment Insurance Act is to alleviate the economic insecurity and burden caused by involuntary unemployment. *Jones v. Dept. of Employment Security*, 276 Ill. App. 3d 281 (1995). While benefits are a conditional right and the burden of establishing eligibility rests with the claimant, the Act must be

liberally construed to favor the awarding of benefits. *Kiefer v. Dept. of Employment Security*, 266 Ill. App. 3d 1057 (1994). A worker disqualified for benefits if he willfully violates a reasonable company rule known to him and the violation causes harm to the employer or occurs after repeated warnings in respect to the misconduct. *Zuaznabar v. Board of Review,* 257 Ill. App. 3d 354 (1993). Disqualifying misconduct does not include mere insufficiency, ordinary negligence or good faith errors in judgment. *Winklmeier v. Board of Review*, 115 Ill. App. 3d 154 (1983). Even though an employee's conduct may justify his discharge, it does not necessarily disqualify him from receiving unemployment benefits. *Pesce v. Board of Review*, 161 Ill. App. 3d 879 (1987). Although the work history of an employee is extremely relevant, the acts that ultimately led to a discharge must constitute misconduct. *London v. Dept. of Employment Security*, 177 Ill. App. 3d 276 (1988).

The inability of plaintiff to immediately produce his grade book was due to the fact that he was provided with no notice of his impending suspension. The fact that plaintiff did produce his attendance book shows that he was willing to cooperate despite having just received the despairing news of his suspension. It conceivably could constitute misconduct, if plaintiff failed to produce his grade book after receiving reasonable notice of his suspension and the need for the grade book. Under the circumstances of this case, however, the finding of the Board that the acts of plaintiff constitute misconduct is against the manifest weight of the evidence.

Accordingly, the decision of the Board is reversed and plaintiff is entitled to unemployment benefits.

Judge Thomas P. Quinn
November 15, 2000
Circuit Court - 238

_____

Judge Thomas P. Quinn